IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 31 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA :

HONOURABLE MR.JUSTICE KS JHAVERI :

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHARVAD VAJIBEN W/O BHIKHA PUNJA & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR ADIL MEHTA for Appellant(s) : 1 - 2.
MR KP RAVAL APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 18/09/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1.0 This Appeal is directed against the judgment and order dated dated 15th November, 1997 passed by the learned Addl. Sessions Judge, Surendranagar in Sessions Case No. 21 of 1997 whereby, the appellants were convicted for the offences punishable u/s. 364, 302 and 34 of the Indian Penal Code, 1860 [for short, "the IPC"]. For conviction u/s. 364 & 34 of the IPC, the appellants were sentenced to undergo Rigorous Imprisonment for a period of seven years with fine of Rs.250/- each and in default of payment of fine, further Rigorous Imprisonment for a period of three months; while for conviction u/s. 302 of the IPC, the appellants were sentenced to undergo imprisonment for life with fine of Rs.250/- each and in default of payment of fine, further Rigorous Imprisonment for a period of three months. Both the sentences were ordered to run concurrently. The appellants were also given the benefit of set-off.

2.0 The brief facts of the prosecution case are as under;

2.1 The appellant no. 1 was the wife of deceased – Bhikha Punja while appellant no. 2 was working as a truck Driver. Appellant no. 1 was residing along with her family which consisted of her deceased – husband and five children while appellant no. 2 was an unmarried youth. They all resided in the same village and also belonged to the same community. Both the appellants were known to each other.

2.2 As the deceased, husband of appellant no. 1, was having doubts regarding the relationship between the appellants, disputes used to take place between appellant no. 1 and the deceased. On 22.12.1996 appellant no. 1 left for her parental home, as her father had to be operated for the treatment of the eyes. On the next day, i.e. on 23.12.1996, the deceased left for another village for the purpose of purchasing cattle.

2.3 On 28.12.1996 two individuals found a highly decomposed human body lying in the outskirts of village Bamanbore. Therefore, a complaint to that effect was filed by one of them named Shamjibhai Mohanbhai with Chotila

Police Station which was registered as 'Janwajog' entry vide Exhibit – 36. Preliminary investigation was carried out. Inquest 'panchnama' was done and, thereafter, the dead body was sent to Civil Hospital at Chotila for the purpose of performing post-mortem. However, since there was no facility for performing post-mortem at Civil Hospital, Chotila the dead body was sent to Irvin Hospital, Jamnagar. Prior to performing the post-mortem, the clothes and other articles found from the dead body were seized by way of a separate 'panchnama'.

2.4 Post-mortem was carried out and the Report showed that death had taken place on account of some external injury. As the dead body could not be identified on account of decomposition, it was cremated at Jamnagar crematorium. All the 'muddamal' articles as well as clothes were sent by Jamnagar Police Station to Chotila Police Station for further investigation.

2.5 On the basis of the post-mortem report, on 30.12.1996 the Investigating Officer of Chotila Police Station

filed a complaint against unknown persons, which was later registered as Chotila Police Station I-C.R. No. 192 of 1996 for offences punishable u/s. 302 of IPC and Section 135 of the Bombay Police Act.

2.6 As the whereabouts of the deceased was not known for a few days, the family members started making necessary inquiry. After few days, they came to know that an unidentified dead body has been recovered by Chotila Police Station which was lying in the outskirts of the village. Therefore, the brother and other relatives of the deceased went to Chotila Police Station. No photographs were taken of the said dead body since the same had highly decomposed and, therefore, the only source left to identify the dead body was the 'muddamal' clothes and other articles recovered from the dead body. However, on the basis of the same, the dead body was identified to be of the deceased by the elder brother of the deceased.

2.7 Further investigation was carried out and statements of several witnesses were recorded. As the

Investigating Officer found cogent evidence against the appellants herein, both the appellants were arrested. Arrest 'Panchnama' was prepared and the appellants were sent to judicial custody. In the meanwhile, the ‘muddamal’ articles collected from the scene of offence were sent to F.S.L. for examination. On receipt of the F.S.L. Report and other reports, the same were kept in the investigation file.

2.8 On completion of investigation, charge-sheet was filed against the appellants in the Court of learned Judicial Magistrate First Class, Chotila. Since the case was exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Sessions Court, Surendranagar and the same was numbered as Sessions Case No. 21 of 1997. As the appellants pleaded not guilty to the charges, trial was conducted against them.

3.0 The prosecution has examined in all twenty seven witnesses to prove the guilt against the appellants. PW – 1 Madhabhai Punjabhai at Exhibit – 7, PW – 2 Dr. Nalinchandra T. Pandya at Exhibit – 8, PW – 3 Rameshbhai

Bhikhabhai at Exhibit – 10, PW – 4 Bachubhai Mohanbhai at Exhibit – 11, PW – 5 Bayaben Punjabhai at Exhibit – 12, PW – 6 Vasantbhai Jethabhai at Exhibit – 13, PW – 7 Harjibhai Amirbhai at Exhibit – 15, PW – 8 Mavjibhai Kanabhai at Exhibit – 16, PW – 9 Labhuben Boghabhai at Exhibit – 18, PW – 10 Maniben Rathabhai at Exhibit – 19, PW – 11 Ratnabhai Gokalbhai at Exhibit – 20, PW – 12 Dineshbhai Punjabhai at Exhibit – 21, PW – 13 Savjibhai Jivabhai at Exhibit – 22, PW – 14 Shailesh Jadavjibhai at Exhibit – 23, PW – 15 Rameshbhai Bhalabhai at Exhibit – 24, PW – 16 Salimbhai Hajibhai at Exhibit – 25, PW – 17 Kishorbhai Tulashibhai at Exhibit – 26, PW – 18 Yunushbhai Gulabbhai at Exhibit – 27, PW – 19 Gabharubhai Nagbhai at Exhibit – 30, PW – 20 Bachubhai Dharamashibhai at Exhibit – 33, PW – 21 Dilavarsinh Lalubha at Exhibit – 35, PW – 22 Torubha Ramubhai Zala at Exhibit – 39, PW – 23 Dr. Bansidhar Ganpatbhai Gupta at Exhibit – 51, PW – 24 Ranabhai Dharabhai at Exhibit – 53, PW – 25 Shamjibhai Mohanbhai at Exhibit – 54, PW – 26 Gabharubhai Nagbhai at Exhibit – 55, PW – 27 Talshibhai Manjibhai Dholakia at Exhibit – 57.

3.1 The prosecution has also relied upon several documentary evidences and, more particularly, the evidences in the form of 'panchnama' of clothes and other articles recovered from the dead body of the deceased at Exhibit – 43, the complaint at Exhibit – 44 and the Post-mortem Report at Exhibit – 52.

3.2 On submission of the closing ‘purshis’, the further statements of the appellant were recorded u/s. 313 of the Code of Criminal Procedure, 1973. After hearing learned counsel for the respective parties, the learned Addl. Sessions Judge passed the impugned judgment and order and convicted the appellants for the offences and imposed sentences as narrated in the earlier part of this judgment. Hence, the present appeal.

4.0 Mr. Adil Mehta learned Advocate for the appellants has submitted that the case of the prosecution is solely based on circumstantial evidence and that in order to convict the appellants for the offences alleged against them,

the prosecution has to establish the entire chain of circumstances beyond doubt. He has submitted that in the case on hand, the prosecution has miserably failed to establish the chain of circumstances pointing towards the guilt of the appellants and, therefore, the appellants ought not to have been convicted for the alleged offences.

5.0 Learned Advocate for the appellants has further submitted that the Court below has heavily relied upon the evidence of PW – 3, while recording the conviction of the appellants, though he is not an eye-witness to the said incident. He has submitted that PW – 3 in his deposition has stated that appellant no. 2 was known to him and that the appellants had a cordial and friendly relation with each other, on account of which the deceased had grudge against appellant no. 2. This witness has further deposed that on one occasion the deceased had also seen both the appellants together.

5.1 Learned Advocate has contented that merely because a cordial and friendly relation existed between the

appellants, the appellants cannot be involved in the alleged offence in question. He has further contented that PW – 3 in his deposition before the Court below has categorically stated that at about one year prior to the date of incident, a quarrel had taken place between appellant no. 2 and his father, i.e. the deceased on the aspect of alleged illicit relationship between the appellants and that for the said reason, the appellant no. 2 had also attempted to cause injuries to the deceased with a sword.

5.2 Learned Advocate has contented that, however, in his cross-examination, PW – 3 has specifically stated that the above referred facts viz. the existence of friendly relations between the appellants, the incident of both the appellants being seen together by the deceased on one occasion and that of appellant no. 2 attempting to cause injuries to the deceased with a sword, was not stated by him in his statement given before the police. Therefore, the Court below has committed serious error in relying upon the evidence of this witness.

6.0 Learned Advocate for the appellants has further submitted that so far as the case of appellant no. 1 is concerned, it is evident from the cross-examination of PW – 3 that appellant no. 1 had not gone to her parental home since last about 8 – 10 months and that she had left for her parental home on the day prior to the day when the deceased had left home for the purpose of purchasing cattle. It is also evident that for the same the deceased himself had accompanied appellant no. 1 to the bus-stop.

6.1 Learned Advocate has, therefore, submitted that from the cross-examination of PW – 3, it is clearly established that appellant no. 1 had left for her parental home on the day prior to the day when the deceased had gone to purchase cattle and that the deceased himself had accompanied her up to the bus-stop.

7.0 Learned Advocate for the appellants has next taken us through the evidence of the '*Sarpanch*' of the village who has deposed as PW – 4 at Exhibit – 11. He has submitted that PW – 4 has also stated in his deposition that

some illicit relationship existed between the appellants, on account of which disputes used to take place between the deceased and appellant no. 1. The said witness has also further deposed that on account of the said alleged relationship, a quarrel had also taken place between the deceased and appellant no. 1 at about one year prior to the date of incident and that, subsequently, the said dispute was settled through the members of the community wherein, he was also a member.

7.1 Learned Advocate has further submitted that this witness has further deposed that he was working in a Co-operative Society and that he used to go to his office in his motor-cycle and that for going to his office, he has to pass through the outskirts of the village. This witness has also deposed that on one occasion, he had also seen both the appellants together and that to after the aforesaid compromise had taken place.

7.2 Learned Advocate has contented that from the cross-examination of this witness, it could be seen that this

witness has not narrated the said facts of his doing service in a Co-operative Society and of his passing through the outskirts of village Otala while going to his work-place in his statement before the police. Apart from that this witness has also not narrated about the so-called compromise between appellant no. 2 and the deceased in his statement before the police.

7.3 Learned Advocate has, therefore, submitted that the evidence led by this witness, so far as it related to the so-called compromise and of his seeing both the appellants together in the outskirts of the village after the so-called compromise, are contrary to his deposition and the same cannot be relied upon. Thus, the Court below has committed serious error in relying upon the evidence of this witness.

8.0 Learned Advocate for the appellants has further submitted that so far as the evidence led by PW – 5, the mother of the deceased is concerned, the same has not been believed by the Court below.

9.0 Learned Advocate for the appellants has next taken us through the evidence of PW – 10 at Exhibit – 19 and PW – 11 at Exhibit – 20. He has submitted that these witnesses have not deposed the true facts. He has submitted that the said fact is established from the evidence led by both these witnesses in the form of their depositions as well as cross-examinations. Therefore, the Court below has committed serious error in convicting the appellants for the crime in question.

10.0 Learned Advocate for the appellants has, therefore, submitted that considering the facts and circumstances of the case, it is clearly established that there is no evidence on record to connect the appellants with the crime in question and that this being a case entirely based upon circumstantial evidence, the prosecution has completely failed to establish the chain of circumstances proving the guilt of the appellants. Hence, the impugned judgment and order passed by the Court below is required to be quashed and set aside and the appellants are required

to be acquitted from the alleged offences in question.

11.0 Mr. K. P. Raval learned APP has supported the judgment passed by the Court below and has submitted that the Court below was completely justified in convicting the appellants for the crime in question as the prosecution has proved the entire chain of circumstances which point towards the guilt of the appellants. He has submitted that the Court below has rightly appreciated the entire oral as well as documentary evidence on record and, therefore, no interference is required by this Court in this Appeal.

12.0 We have heard learned counsel for the respective parties and perused the entire oral as well as documentary evidence on record as also the impugned judgment and order passed by the Court below. Undisputedly, the entire case of the prosecution rests upon circumstantial evidence. It is a settled principle of law that circumstantial evidence can be reasonably made the basis of an accused person's conviction, if it of such a character that it is wholly consistent with his guilt. Therefore, if the appellants are to

be convicted for the offences alleged against them, then all the circumstances brought out by the prosecution must inevitably and exclusively point to their guilt and there should not be any circumstance which may reasonably be considered consistent with their innocence.

13.0 We have carefully scrutinized the evidence led by all the witnesses and, more particularly, the evidence of PW – 1 Madhabhai Punjabhai at Exhibit – 7, PW – 3 Rameshbhai Bhikhabhai at Exhibit – 10, PW – 4 Bachubhai Mohanbhai at Exhibit – 11, PW – 5 Bayaben Punjabhai at Exhibit – 12, PW – 10 Maniben Ratnabhai at Exhibit – 19 and PW – 11 Ratnabhai Gokulbhai at Exhibit – 20 on whose evidence the Court below has mainly relied on for convicting the appellants for the alleged offence in question. Having gone through the evidence of the aforesaid witnesses, one fact which is completely undisputed is that neither of these witnesses are eye-witnesses to the alleged incident in question. Therefore, in order to prove the guilt against the appellants, the prosecution has to establish the entire chain of circumstances pointing towards the guilt of the appellants

and there should be no circumstance which may reasonably be consistent with their innocence.

14.0 From the evidence led by PW – 3, it transpires that this witness has deposed only on the aspect of friendship between the appellants and that, on one occasion, he had also seen both the appellants together. Now, if we go through his cross-examination, it is established that the said facts have not been narrated by him in his statement before the police.

14.1 Thus, it is evident that the said facts have been narrated by him, for the first time, before the Court below only. Even if we accept the version of this witness *in toto*, then also, at the most, it could be said that the appellants had a friendly relationship between them. Now, only because the appellants were known to each other, they could not be held guilty for the alleged offence in question, more particularly, when there is not an iota of evidence on record to connect them with the crime in question. Both the appellants are hailing from the same community and also

reside in the same locality and, hence, a relationship of friendship could exist. Therefore, simply on the ground that a relationship of friendship existed between the appellants, it could not be presumed that they are the culprits. It appears that the learned trial Judge has swayed away since the appellants herein are of the opposite sex and had a relationship of friendship between them. Thus, we are of the opinion that the evidence led by this witness shall be of no use to the prosecution case.

15.0 So far as the evidence led by PW – 1 at Exhibit – 7 and PW – 5 at Exhibit – 12 are concerned, it is clearly borne out that these witnesses were not even aware about the alleged illicit relationship between the appellants or, in that case, about the said relationship of friendship between them. Thus, it could be concluded that these two witnesses were completely unaware about the existence of any kind of relationship between the appellants. Hence, we are not dealing with the evidence led by the aforesaid two witnesses in detail and, accordingly, find it of no use to the prosecution case.

16.0 As regards the evidence of PW – 4 at Exhibit – 11 is concerned, it is established from his cross-examination that this witness has not narrated about the facts of his working in a Co-operative Society and also of his passing through the outskirts of the village for going to his work-place in his statement before the police. Moreover, this witness has also not narrated about the fact regarding the so-called compromise in his statement before the police. Hence, the evidence led by this witness shall not be of any help to the case of the prosecution since it does not point to the guilt of the appellants in any manner whatsoever.

17.0 PW – 10 at Exhibit – 19 and PW – 11 at Exhibit – 20 are wife and husband respectively. It is the case of the prosecution that appellant no.1, on the day prior to the date of incident, was present in their house for about 8 – 10 hrs. during night-time and that appellant no. 1 had not gone to her parental home as has been contented by learned Advocate for the appellants.

17.1 If we carefully scrutinize the evidence led by these two witnesses, it transpires that PW – 10 & PW – 11 are relatives of the elder brother of the deceased, i.e. PW – 1 and that the said fact has also been admitted by both the witnesses. It is also established from the evidence of these two witnesses that prior to the date of the alleged incident PW – 1 had visited their home.

17.2 Thus, if we consider the evidence led by these two witnesses, it is difficult to conclude that appellant no. 1 was present in the house of these witnesses on the day prior to the date of alleged incident and that to for a period of about 8 – 10 hrs. during night-time. No cogent evidence is on record to lead us to a definite conclusion that appellant no. 1 was present in the house of these witnesses on the said date. Even if we accept the evidence led by these two witnesses *in toto*, then also, it does not point towards the guilt of the appellants. Thus, we hold that the evidence led by this witness shall also be of no use to the case of the prosecution.

18.0 Undoubtedly, the deceased died a homicidal death. The said fact is also proved from the post-mortem report at Exhibit – 52. The same is also not disputed by learned counsel for the appellants and, therefore, we are not discussing the same in detail. Since we do not find the evidence led by other witnesses of any importance to the prosecution case, we have not dealt with and discussed the same.

19.0 Suffice to say that we have no hesitation in holding that the prosecution has miserably failed to establish the chain of circumstances pointing towards the guilt of the appellants. No circumstance, even to the remotest possible extent, connects the appellants with the crime in question. In our opinion, the evidence on record, as discussed hereinabove, is sufficient and satisfactory to prove the innocence of the appellants. Hence, the Court below has committed serious error in law and on facts in convicting the appellants for the alleged offence and, therefore, the appellants are required to be acquitted.

20.0 For the foregoing reasons, the Appeal is allowed. The impugned judgment and order dated 15th November, 1997 passed by the learned Addl. Sessions Judge, Surendranagar in Sessions Case No. 21 of 1997 is quashed and set aside. The appellants are acquitted from the offences alleged against them. Since the appellants are already on bail, their bail bonds stand cancelled. Office to send the Record & Proceedings to the trial Court concerned forthwith.

[R. P. Dholakia, J.] [K. S. Jhaveri, J.]

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